RECORD AND BRIEFS

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MAYRA RIVAS-RODRIGUEZ,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the REAL ID Act of 2005, Congress modified the standard required for an asylum applicant to show a nexus between a persecutor's motive and a protected ground entitling an applicant to asylum. Addressing the often mixed motives of persecutors, the amended statute requires an asylum applicant to show that a protected ground was or will be "*at least one central reason*" for the persecution.

However, the Board of Immigration Appeals ("BIA") has interpreted the "*at least one central reason*" language to necessitate a showing that the asserted persecution is based on a protected ground that is more than "incidental, tangential, superficial or subordinate" to another unprotected reason. Some federal courts of appeal, including the Fourth Circuit, have applied the BIA's interpretation. Other federal courts of appeal have rejected the BIA's interpretation, either expressly or impliedly. The Third Circuit squarely rejected the BIA's use of the word "subordinate," finding it to be inconsistent with the statute's plain language requiring that the protect ground be "at least one central reason" as opposed to the dominate reason for the persecution. Thus, this petition presents a question that is now the subject of a direct conflict among the circuits:

1. Whether the adoption of the "*at least one central reason*" standard in the REAL ID Act of 2005 prohibits subordination of a protected ground to an unprotected ground where both are "central reasons" for the persecution.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that the names of the parties before the United States Court of Appeals for the Fourth Circuit appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mayra Rivas-Rodriguez respectfully petitions this Court for a writ of certiorari to review the decision entered by the United States Court of Appeals for the Fourth Circuit denying Mayra Rivas-Rodriguez's petition for review.

OPINIONS BELOW

The opinion of the Fourth Circuit, App. 1a-5a, is reported at 2009 WL 4691907, 2009 U.S. APP. LEXIS 26911 (4th Cir. 2009). The January 29, 2009 opinion of the Board of Immigration Appeals, App. 6a-8a, and the June 25, 2007 opinion of the Immigration Judge, App. 9a-24a, are unreported.

JURISDICTION

The Fourth Circuit entered judgment on December 10, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Fourth Circuit exercised jurisdiction under 8 U.S.C. §1252(a). The BIA exercised jurisdiction under 8 C.F.R. §1003.1(b).

STATUTORY PROVISIONS INVOLVED

This petition concerns the statutory requirements for asylum and withholding of removal under the Immigration and Nationality Act ("INA") §§101(a)(42)(A), 208(b)(1)(A), 208(b)(1)(B)(i), and 241(b)(3)(A).

INA §101(a)(42)(A) [8 U.S.C. §1101(a)(42)(A)] defines the term "refugee" as:

"[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]"

INA §208(b)(1)(A) [8 U.S.C. §1158(b)(1)(A)] provides that:

"The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title."

INA §208(b)(1)(B)(i) [8 U.S.C. §1158(b)(1)(B)(i)] provides that:

"The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101 (a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership

in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."

INA §241(b)(3)(A) [8 U.S.C. §1231(b)(3)(A)] provides that:

"Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

STATEMENT OF THE CASE

1. An individual may seek the protection of the United States in the form of asylum and withholding of removal. 8 U.S.C. §§1101(a)(42)(A), 1231(b)(3)(A). To qualify, an asylum applicant must show that she is unable to return to, and is unable to avail herself of the protection of her native country because of persecution or a well-founded fear of persecution "on account of [her] race, religion, nationality, membership in a particular social group, or political opinion[.]" 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(A); *see also* 8 U.S.C. §1231(b)(3)(A).

2. Before Congress's enactment of the REAL ID Act of 2005, an asylum applicant was required to show that "her persecution was caused 'at least in part'" by a protected ground. *Ndayshimiye v. Attorney General*, 557 F.3d 124, 129 (3d Cir. 2009); *Parussimova v. Mukasey*, 555 F.3d 734, 739-740 (9th Cir. 2009). In the REAL ID Act of 2005, Congress

modified the standard to require an asylum applicant to establish that one of the protected grounds "was or will be *at least one central reason*" for her persecution. *See, e.g., Ndayshimiye*, 557 F.3d at 129 (emphasis added); *see also Parussimova*, 555 F.3d at 739-740; 8 U.S.C. §1158(b)(1)(B)(i). By adding this requirement to INA §208, Congress intended to resolve "conflicts between fora" and provide a unified standard for analyzing persecution based on mixed-motives. *Ndayshimiye*, 557 F.3d at 130 (quoting H.R. Rep. No. 109-72 at 162 (2005) (quotes omitted)).

3. This case arises out of the proper interpretation of the "at least one central reason" language and the denial of Petitioner's application for asylum and petition for review. After the conclusion of the immigration hearing, the Immigration Judge ("IJ") held that Petitioner Ms. Rivas-Rodriguez had established a well-founded fear of future persecution if returned to El Salvador. App. 21a. The IJ found that Ms. Rivas-Rodriguez was targeted as a source of money for the gangs, App. 22a, and that she has a well-founded fear of being raped in the future by gang members in El Salvador if returned. App. 21a. The IJ found Ms. Rivas-Rodriguez's testimony credible,[1] App. 20a, that she was repeatedly targeted for money by gang members and subjected to sexual assault by gang members. App. 13a-14a. The IJ,

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[1] When the IJ makes positive credibility determination, reviewing courts accept the asylum applicant's testimony as true. *See, e.g., Barrios v. Holder*, 581 F.3d 849, 854 (9th Cir. 2009); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 302 (3d Cir. 2004).

however, ignored the link between Ms. Rivas-Rodriguez's vulnerability to sexual violence by gang members and her status as a steady source of money for gang members. Instead, the IJ separated and subordinated the sexual assault aspect of Ms. Rivas-Rodriguez's persecution. App. 22a. The IJ concluded that she "was targeted principally because she was a source of money for the gangs," rather than targeted for sexual assault by gang members because of her membership in a particular social group.[2] App. 22a.

4. The Board of Immigration Appeals ("BIA") affirmed the IJ's decision "[f]or the reasons set forth in the Immigration Judge's decision." App. 7a-8a. The BIA found no error in the IJ's conclusion that Ms. Rivas-Rodriguez did not show "a nexus to a protected ground," because "she did not show that her membership in a particular social group was or will be at least one central reason for the harm she experienced or will experience" if returned to El Salvador. App. 7a. In reaching its holding, the BIA specifically cited its prior decision in *In re J-B-N-*. App. 7a (citing 24 I. & N. Dec. 208, 214 (BIA 2007), *aff'd in part, rev'd in part sub nom. Ndayshimiye*, 557 F.3d at 130-131). In *J-B-N-*, the BIA addressed the situation where persecutors act with mixed

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[2] A main element of Ms. Rivas-Rodriguez's social group is that it is comprised of "young, single, independent wom[e]n who receive[] money from a parent in the United States." App. 7a n.2; App. 22a. The IJ apparently did not consider that the combination of the gang's sexual assault on petitioner and her status as a steady source of money was on account of her membership in the particular social group described.

motives, stating that "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment." 24 I. & N. at 214. The BIA defined this further, stating that the motive claimed "cannot be incidental, tangential, superficial, *or subordinate* to another reason for harm. Rather, it must be a central reason for persecuting the respondent." *Id.* (emphasis added).

5. The Fourth Circuit denied Ms. Rivas-Rodriguez's petition for review. App. 4a-5a. The Fourth Circuit found that persecution or a well-founded fear of persecution because of Ms. Rivas-Rodriguez's membership in a particular social group had not been established. Citing its decision in *Quinteros-Mendoza v. Holder* and the BIA's *J-B-N-* decision, the Fourth Circuit stated that a "protected ground must be a central reason for being targeted for persecution." App. 4a. (citing 556 F.3d 159, 164 (4th Cir. 2009); *J-B-N-*, 24 I. & N. Dec. at 214). Reciting the BIA's definition of "a central reason," the Fourth Circuit stated that "[a] central reason is one that is more than 'incidental, tangential, superficial, or *subordinate* to another reason for harm." App. 4a. (quoting *J-B-N-*, 24 I. & N. Dec. at 214) (emphasis added). Following *J-B-N-* and *Quinteros-Mondoza* on the interpretation of "one central reason," the Fourth Circuit concluded that Ms. Rivas-Rodriguez "would be targeted regardless of her membership in her particular social group." App. 4a-5a.

6. The *J-B-N-* definition of "at least one central reason," that both the BIA and the Fourth Circuit relied on here, is, however, a rejected definition. *See Ndayshimiye*, 557 F.3d at 130-131, *aff'g in part, rev'g*

in part J-B-N-, 24 I. & N. 208 (BIA 2007). When the BIA's *J-B-N-* decision was appealed, the Third Circuit squarely rejected the BIA's interpretation of the "at least one central reason" language requiring an asylum applicant to show that a protected ground for persecution was not "subordinate" to an unprotected ground of motivation. *Id.* at 129-130.

REASONS FOR GRANTING THIS PETITION

A direct conflict exists among the United States Courts of Appeal over the interpretation of the "at least one central reason" language added to INA §208 by Congress in the REAL ID Act of 2005. The First, Fourth, and Fifth Circuits apply a definition adopted by the BIA, which permits a court to deny asylum if the protected ground is determined to be subordinate to another unprotected ground. Conversely, the Third, Eighth, and Ninth Circuits have rejected, either expressly or impliedly, the "subordinate" language contained in the BIA's interpretation of the statute, which avoids denial of asylum based on a hierarchy of motivations where one motive dominates and the remainder are subordinate. The BIA's interpretation, followed by the First, Fourth and Fifth Circuits, is inconsistent with the plain language of the statute and inconsistent with Congress's intent to resolve conflicts that previously existed between the courts when addressing mixed-motive persecutions. This case is an appropriate vehicle for resolving the conflict among the Courts of Appeal as to the interpretation of the "at least one central reason" language added to INA §208 by the REAL ID Act of 2005.

As the Third Circuit explained when it dealt with the BIA's *J-B-N-* decision on appeal, "one central reason" for persecution exists even if a persecutor "ha[s] more than one central motivation for his or her actions[.]" *Ndayshimiye*, 557 F.3d at 129-30, *aff'g in part, rev'g in part J-B-N-*, 24 I. & N. 208 (BIA 2007). "[O]ne central reason" is very different than *the* central reason or "a dominant motivation" for the persecution. *Id.* Because Congress's plain language makes it "irrelevant" whether any "central reason[] is more or less important than another," the Third Circuit rejected the BIA's extra requirement that a protected ground "not be subordinate to any other reason." *Id.* The United States Courts of Appeals for the Eighth and Ninth Circuits have both reached similar holdings. *See, e.g., Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir 2009); *Parussimova*, 555 F.3d at 741.

In contrast, the First, Fourth and Fifth Circuits continue to use the BIA's rejected interpretation that "one central reason" must not be "incidental, tangential, superficial, or *subordinate* to another reason for [the] harm." *See, e.g., Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) (emphasis added); App. 4a; *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009). This interpretation effectively requires an asylum applicant to show that a statutorily protected ground was *the* central or dominate reason for her persecution. *See, e.g., Singh*, 543 F.3d at 5; App. 4a-5a; *Shaikh*, 588 F.3d at 864. Even if an asylum applicant was persecuted because of a statutorily protected ground, under this rejected standard, if she was persecuted for a dominate, but unprotected reason, asylum will be

denied. *See, e.g.*, *Singh*, 543 F.3d at 5; App. 4a-5a; *Shaikh*, 588 F.3d at 864.

Here, for instance, the Fourth Circuit omitted an analysis as to whether *one* central reason for Petitioner Ms. Rivas-Rodriguez's proven persecution, App. 20a-21a, was because of her membership in a social group. App. 4a-5a. Instead, the Fourth Circuit concluded that asylum and withholding of removal are improper if an asylum applicant "would be targeted regardless of her membership in [a] particular social group." App. 4a-5a. This approach completely evades the required mixed motive analysis where a dominating unprotected ground can be identified.

In addition to being based on a rejected definition of "one central reason," the Fourth Circuit's holding is also contrary to that of other Courts of Appeal and effectively nullifies the plain language Congress carefully selected to fulfill the humanitarian aspects of the INA. Because the Fourth Circuit's holding denies this asylum applicant, and countless others similarly situated, of the protection Congress created for them, this case merits this Court's review.

A. THE BIA'S INTERPRETATION OF INA §208 IMPROPERLY REQUIRES AN ASYLUM APPLICANT TO SHOW THAT A PROTECTED GROUND FOR HER PERSECUTION WAS NOT "SUBORDINATE" TO HER PERSECUTOR'S OTHER MOTIVES

Following Congress's 2005 amendment to INA §208, the BIA interpreted the "one central reason" standard as requiring an asylum applicant to show her persecution on a protected ground was not "incidental, tangential, superficial or *subordinate* to another reason" for the persecution. *J-B-N-*, 24 I. & N. Dec. at 214 (emphasis added).

In *J-B-N-*, the BIA interpreted Congress's newly enacted "one central reason" standard, which was created to provide a "uniform standard for assessing motivation" in mixed motive cases. *Id.* at 212 (citing H.R. Rep. No. 109-72 at 163 (2005)). Starting with the plain language of the statute, the BIA noted that Webster's II New College Dictionary defined "central" as "having *dominant* power, influence, or control." *Id.* (quoting Webster's II New College Dictionary 181 (1st ed. 1995)) (emphasis original). The BIA acknowledged that any definition that included "dominant" could cause problems by rendering "all other motives, regardless of their significance to the case, secondary and therefore ultimately irrelevant." *Id.* at 212-13, n.6. The BIA next considered the amendment's legislative history, including Congress's statement that "the protected

ground cannot be merely 'incidental or tangential to the persecutor's motivation.'" *Id.* at 213 (quoting H.R. Rep. 109-72 at 63 (2005)). Turning back to Webster's Dictionary, the BIA defined incidental as "of a minor, casual, or subordinate nature," and defined tangential as "superficially relevant." *Id.* at 213 (citing Webster's II New College Dictionary 560, 1126 (1st ed. 1995)). Based on these definitions, the BIA concluded that "one central reason" had to be one that was not "incidental, tangential, superficial, or *subordinate* to any other reason for harm." *Id.* at 214 (emphasis added). The asylum applicants appealed the BIA's interpretation of "one central reason" to the Third Circuit. *See Ndayshimiye*, 557 F.3d at 128-129, 130-131, *aff'g in part, rev'g in part J-B-N-*, 24 I. & N. 208 (BIA 2007).

B. THE THIRD, EIGHTH, AND NINTH CIRCUITS HAVE REJECTED THE BIA'S "SUBORDINATE" REQUIREMENT

When *J-B-N-* reached the Third Circuit, the Third Circuit carefully analyzed INA §208's plain language and legislative history, before rejecting the BIA's interpretation "requir[ing] an asylum applicant to show that a protected ground for persecution was not 'subordinate' to any unprotected motivation" as inconsistent with Congress's plain language and intent. *Ndayshimiye*, 557 F.3d at 129.

The Third Circuit assessed the BIA's interpretation using the two-step inquiry required by *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The Third Circuit stated by

considering "whether Congress ha[d] directly spoken to the precise question at issue." *Ndayshimiye*, 557 F.3d at 129 (quoting *Chevron*, 467 U.S. at 842) (quotes omitted).[3]

The Third Circuit determined that Congress deliberately chose the phrase "one central reason" rather than "the central reason" when drafting INA §208. *Id.* This demonstrated that Congress did not want a mixed-motives analysis "[to] depend on a hierarchy of motivations in which one is dominant and the rest are subordinate." *Id.* This choice, as reflected in INA §208's "plain language," also indicated Congress's recognition that although "a persecutor may have more than one central motivation for his or her actions" the question of "whether [any] one of those central reasons is more or less important than another is irrelevant." *Id.* at 129-130.

The Third Circuit also pointed out that even the BIA acknowledged that "a central reason" for the persecution did not have to be "a 'dominant' motivation." *Id.* (citing *J-B-N-*, 24 I. & N. Dec. at 212). Because the BIA's "subordinate" requirement imposed the "mirror image of the rejected 'dominance' test," the Third Circuit held that the BIA could not require "a protected ground, even if a 'central' reason for persecution, [not] be *subordinate* to any other reason." *Id.* (emphasis added). Thus,

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[3] Because the plain language of the statue was not "ambiguous," the Third Circuit did not undertake the second step of the *Chevron* analysis. *Ndayshimiye*, 557 F.3d at 129.

the Third Circuit concluded that INA §208 only required that a central reason for the persecution be one that is not "incidental, tangential, or superficial." *Id.* at 130-131.

In adopting this interpretation of INA §208, the Third Circuit noted that not all the Circuit Courts of Appeal had adopted the BIA's erroneous interpretation in *J-B-N-*. *See Id.* at 130. In particular, the Third Circuit pointed to the Ninth Circuit's decision in *Parussimova v. Mukasey* as implicitly excising the word "subordinate" from the BIA's definition. *Id.* (citing *Parussimova v. Mukasey*, 533 F.3d 1128, 1135 (9th Cir. 2008), *amended by* 555 F.3d 734 (9th Cir. 2009)).

In *Parussimova*, the Ninth Circuit considered the one central reason standard and held that a persecutor's "motive is *a* 'central reason' if that motive, standing alone, would have led the persecutor to harm the applicant." 555 F.3d at 741 (emphasis added). Because "persecution may be caused by more than one central reason," the Ninth Circuit held that an asylum applicant "need not prove which reason was dominant." *Id.* The Ninth Circuit further noted that the plain language of INA §208 led to the conclusion that the protected ground need not be the most important reason why the persecution occurred:

> [A]n applicant need not prove that a protected ground was the most important reason why the persecution occurred. The Act states that a protected ground must constitute "at least one" of the central reasons for the

> persecutory conduct; it does not require that [this] reason account for 51% of the persecutors' motivation.
> *Id.* at 740.

Finally, the Ninth Circuit concluded that the "one central reason" standard required an asylum applicant to prove that a protected ground "was a cause of the persecutors' acts." *Id.* at 741. The Eighth Circuit has also adopted this interpretation of INA §208, holding that while the protected ground must be *a* central reason for the persecution, "the persecution need not be solely, or even predominantly, on account of" the statutorily protected ground. *Marroquin-Ochoma*, 574 F.3d at 577.

Under the Third, Eighth, and Ninth Circuit's textual interpretation of INA §208, Ms. Rivas-Rodriguez would likely have been entitled to an analysis as to whether she was a member of a protected social group—an analysis that the BIA and the Fourth Circuit failed to conduct based on an erroneous interpretation of INA § 208 that allows the consideration of subordinate, but protected grounds for asylum to be avoided.

C. THE FIRST, FOURTH, AND FIFTH CIRCUITS CONTINUE TO FOLLOW THE BIA'S INCORRECT INTERPRETATION OF INA §208

The First, Fourth, and Fifth Circuits continue to rely on the BIA's incorrect interpretation of INA §208 and effectively require an asylum applicant to

prove that a statutorily protected ground was *the* central or dominate reason for her persecution. For example, despite the Third Circuit's rejection of the BIA's definition of "one central reason" in *J-B-N-*, the Fourth Circuit continues to hold that "one central reason" must be "one that is more than incidental, tangential, superficial, or *subordinate* to another reason" for the persecution suffered by the asylum applicant. App. 4a (citing *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *In re J-B-N-*, 24 I. & N. Dec. 208 (BIA 2007)) (internal quotes omitted, emphasis added).

In *Quinteros-Mendoza*, despite stating that INA §208 does not require an asylum applicant to prove that the statutorily protected ground "be *the* central reason or even a dominant central reason for [the] persecution," the Fourth Circuit wholly discounted the religious motivations for Mr. Quinteros-Mendoza's persecution because his persecutor's had other unprotected motives for their persecution.[4] 556 F.3d at 164-65. The Fourth Circuit's view effectively nullifies INA §208's plain language by requiring an asylum applicant to prove that the statutorily protected ground was *the* dominating reason for the persecution.

The decision here amply illustrates this. The Fourth Circuit did not even consider whether Ms. Rivas-Rodriguez was persecuted on the basis of her membership in a particular social group. *See* App.

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[4] Persecution based on religion is a statutorily protected ground for asylum. *See* 8 U.S.C. §1101(a)(42)(A).

4a-5a. Rather, the Fourth Circuit held that it did not even need to consider this issue because Ms. Rivas-Rodriguez would have been "targeted regardless of her membership in [a] particular social group." App. 4a-5a. Under this holding, an asylum applicant can never qualify for asylum or withholding of removal if her persecutors have any dominate reason for persecuting her other than a statutorily protected ground.

The First Circuit has also adopted this rejected non-textual view of INA §208. *See Singh*, 543 F.3d at 5 (citing *J-B-N-*, 24 I. & N. Dec. at 214). In *Singh*, because the asylum applicant's persecutors also wanted control of his property, the First Circuit held that the applicant could not demonstrate persecution on account of a political opinion.[5] *Id.* at 7. The Fifth Circuit has also followed *J-B-N-* and reached a similar conclusion. *See Shaikh*, 588 F.3d at 864 (citing *J-B-N-*, 24 I. & N. Dec. at 214) (rejecting an asylum application based on religious persecution because the applicant's persecutors also had non-religious motives for their persecution).

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[5] Persecution based on political opinion is a statutorily protected ground for asylum. *See* 8 U.S.C. §1101(a)(42)(A).

D. THE DIFFERING STANDARDS FOR INTERPRETING "ONE CENTRAL REASON" MAKE THIS CASE A HIGHLY APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT BETWEEN THE CIRCUITS

The INA's humanitarian provisions protect persecuted individuals, like Ms. Rivas-Rodriguez, who are unable to return to, and are unable to avail themselves of the protection of their native country. *See* 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). To provide certainty for persecuted individuals, Congress's standards must be uniformly applied. But the varying interpretations adopted by the various Circuit Courts of Appeal with respect to INA §208 makes eligibility for asylum and withholding of removal inconsistent and forum dependent. This case is a highly appropriate vehicle for resolving the present conflict among the Circuit Courts of Appeal as to the interpretation of the "at least one central reason" language added to INA §208 by the REAL ID Act of 2005.

CONCLUSION

Ms. Rivas-Rodriguez's Petition for a Writ of Certiorari should be granted.

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APPENDIX

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APPENDIX A

***Rivas-Rodriguez v. Holder*,**
2009 WL 4691907,
2009 U.S. App. LEXIS 26911 (4th Cir. 2009)

United States Court Of Appeals
Fourth Circuit

Mayra RIVAS-RODRIGUEZ,
Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General,
Respondent.

No. 09-1239

Submitted Nov. 5, 2009.
Decided Dec. 10, 2009.

On Petition for Review of an Order of the Board of Immigration Appeals.

Jennifer C. Lu, HOWREY, LLP, East Palo Alto, California; Glen W. Rhodes, HOWREY, LLP, San Francisco, California, for Petitioner.

Tony West, Assistant Attorney General, David V. Bernal, Assistant Director, Lindsay E. Williams, Office of Immigration Litigation, United States Department Of Justice, Washington, D.C., for Respondent.

Before WILKINSON and AGEE, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Petition denied by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

*1 Mayra Rivas-Rodriguez, a native and citizen of El Salvador, petitions for review of an order of the Board of Immigration Appeals ("Board") dismissing her appeal from the immigration judge's order denying her applications for asylum, withholding of removal and withholding under the Convention Against Torture ("CAT"). Because the evidence does not compel a different result, we deny the petition for review.

The Immigration and Nationality Act ("INA") authorizes the Attorney General to confer asylum on any refugee. 8 U.S.C. § 1158(a) (2006). It defines a refugee as a person unwilling or unable to return to her native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2006). "Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds. . . ." *Li v. Gonzales,* 405 F.3d 171, 177 (4th Cir. 2005) (internal quotation marks and citations omitted).

An alien "bear[s] the burden of proving eligibility for asylum," *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006); *see* 8 C.F.R. § 1208.13(a) (2009), and can establish refugee status based on past persecution in her native country on account of a protected ground. 8 C.F.R. § 1208.13(b)(1) (2009). Without regard to past persecution, an alien can establish a well-founded fear of persecution on a protected ground. *Ngarurih v. Ashcroft*, 371 F.3d 182, 187 (4th Cir. 2004). The well-founded fear standard contains both a subjective and an objective component. The objective element requires a showing of specific, concrete facts that would lead a reasonable person in like circumstances to fear persecution. *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 353 (4th Cir. 2006). "The subjective component can be met through the presentation of candid, credible, and sincere testimony demonstrating a genuine fear of persecution. The subjective fear [must have] some basis in the reality of the circumstances and [be] validated with specific, concrete facts . . . and it cannot be mere irrational apprehension." *Li*, 405 F.3d at 176 (internal quotation marks and citations omitted).

To establish eligibility for withholding of removal, an alien must show a clear probability that, if she was removed to her native country, her "life or freedom would be threatened" on account of a protected ground. 8 U.S.C. § 1231(b)(3)(A) (2006); *see Camara v. Ashcroft*, 378 F.3d 361, 370 (4th Cir. 2004). A "clear probability" means that it is more likely than not the alien would be subject to persecution. *INS v. Stevic*, 467 U.S. 407, 429-30, 104

S. Ct. 2489, 81 L. Ed. 2d 321 (1984). The protected ground must be a central reason for being targeted for persecution. A central reason is one that is more than "'incidental, tangential, superficial, or subordinate to another reason for harm.'" *See Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (quoting *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (BIA 2007)).

*2 A determination regarding eligibility for asylum or withholding of removal is affirmed if supported by substantial evidence on the record considered as a whole. *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). Administrative findings of fact, including findings on credibility, are conclusive unless any reasonable adjudicator would be compelled to decide to the contrary. 8 U.S.C. § 1252(b)(4)(B) (2006). Legal issues are reviewed de novo, "affording appropriate deference to the BIA's interpretation of the INA and any attendant regulations." *Lin v. Mukasey*, 517 F.3d 685, 691-92 (4th Cir. 2008). This court will reverse the Board only if "the evidence . . . presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias-Zacarias*, 502 U.S. at 483-84; *see Rusu v. INS*, 296 F.3d 316, 325 n.14 (4th Cir. 2002).

We find the evidence does not compel the finding that Rivas-Rodriguez was persecuted or has a well-founded fear of persecution because of her membership in a particular social group. The record supports the finding that the gangs in San Salvador were indiscriminate with whom they targeted. In addition, substantial evidence supports the finding

that Rivas-Rodriguez would be targeted regardless of her membership in her particular social group.

We also find substantial evidence supports the finding that it is not more likely than not that Rivas-Rodriguez will be tortured "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1) (2009).

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

APPENDIX B

***Rivas-Rodriguez v. Holder*,**
Decision of the Board of Immigration Appeals
(BIA Jan. 29, 2009)

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

File: A098 893 254 – Baltimore, M.D.
Date: Jan. 29, 2009

In re: MAYRA RIVAS-RODRIGUEZ

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Glenn W. Rhodes, Esq.

ON BEHALF OF DHS:
Paul McCloskey
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] — Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture.

The respondent, a native and citizen of El Salvador, has appealed from the June 25, 2007, decision of the Immigration Judge. For the reasons

set forth in the Immigration Judge's decision, we find insufficient reason to reverse her determination that the respondent has not established eligibility for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).[1] *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.16(c) (2009). First, we find no clear error in the factual findings of the Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Second, contrary to the respondent's arguments, we find no error in the Immigration Judge's conclusion that the respondent did not establish a nexus to a protected ground, which is her burden, because she did not show that her membership in a particular social group was or will be at least one central reason for the harm she experienced or will experience upon return to EI Salvador (IJ. at 7).[2] *See* sections 208(b)(1) of the Act; 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 2 14 (BIA 2007). Consequently, because the respondent has not met the burden of proof for asylum, it follows that she cannot meet the

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[1] The respondent filed her application for relief on or after May 11, 2005. Accordingly, her claims are governed by the amendments to the Act brought about by the REAL ID Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 302 (2005).

[2] In affirming the Immigration Judge's conclusion, we do not reach the issue of whether the respondent being a young, single, independent woman who receives money from a parent in the United States constitutes membership in a particular social group under the Act.

more stringent burden of proof for withholding of removal. *See* 8 C.F.R. § 1208.16(b); *INS v. Stevic*, 467 U.S. 407 (1984). Similarly, the respondent has not met the burden of proof for protection under the CAT because she has not shown that the harm she fears in EI Salvador would occur with the consent or acquiescence of a public official. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(l), (7).

ORDER: The respondent's appeal is dismissed.

APPENDIX C

Rivas-Rodriguez v. Holder, Decision and Order of the Immigration Judge (June 25, 2007)

United States Department of Justice
Executive Office for Immigration Review
United States Immigration Court
Baltimore, Maryland

In the Matter of	In Removal Proceedings
Mayra RIVAS-RODRIGUEZ	Case #A 98-893-254
Respondent	

Charge: Immigration and Nationality Act ("INA") § 212(a)(b)(A)(i)

Application: Asylum (INA § 208); Withholding of Removal Under INA § 241(b)(3) and Relief under the Contention Against Torture

Individual Hearing Date: June 19, 2007

Appearances: Steffanie Lewis, on behalf of Respondent; Billy Sapp, on behalf of the Department of Homeland Security

Decision and Order of the Immigration Judge[†]

The Respondent is a native and citizen of El Salvador who was born in 1985. She entered the United States on April 2, 2005. She was issued a notice to appear (NTA) on April 4, 2005. In written pleadings, Respondent admitted all allegations and charges in the NTA. Respondent has requested asylum, withholding of removal under INA § 24 1(b)(3), and relief from removal under the Convention Against Torture. The court has found that the Respondent is removable by clear and convincing evidence. *See* INA § 240(c)(I)(A). In the event that Respondent is removed, the country designated for removal is El Salvador. Still at issue before the court is whether Respondent is eligible for relief from removal.

Statement of the Case

The following documentary evidence was considered by the Court and admitted into the record: Exhibit 1, the Notice to Appear; Exhibit 2, Respondent's Motion for a Change of Venue, including Written Pleadings; Group Exhibit 3, Respondent's Asylum Application and Supporting Affidavit; Group Exhibit 4, Respondent's Witness List and Additional Documents A-K; Group Exhibit

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[†] Case names and introductory signals in this decision have italicized to conform to The Bluebook: A Uniform System of Citation R. 10.2, at 81, R. 2.1(d), at 55 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

5, Respondent's Memorandum of Law and Supporting Documents Tabbed A-B; Group Exhibit 6, Respondent's Supplemental Filings (including Tab A); and Group Exhibit 7, Respondent's Additional Documents Tabbed A-E.

The following witnesses appeared in court and presented testimony: the Respondent; Mr. Augustin Rivas; Mr. Andre Rivas; and Ms. Carmen Chapin. Briefly summarized, the case involves a claim that the Respondent fears future persecution in El Salvador by gang members on account of her membership in a particular social group and that the government of El Salvador would be unable or unwilling to control the gang members. While the Respondent's claimed particular social group is described in various ways,[1] at one point Respondent concisely describes the particular social group as "young females who regularly receive money from a parent working in the United States, and who lack[] protection from those in a society who traditionally provide protection to young females." *See* Group Exhibit 5, Memorandum, page 13.

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[1] Respondent's Memorandum and Theory of Asylum Case notes at one point as follows: "The group is easily identifiable. They are late female teenagers whose parents are in the U.S. working and sending money back on a regular basis. The[y] have education and a social status derived from steady financial support. They are a source of money that Gangs can extract by threats of rape because the young women lack protection and are particularly susceptible." Group Exhibit 5, Memorandum, pages 2-3.

The Respondent, who appeared nervous, testified that she left El Salvador because her life was in danger and she could not stay there because of the gangs. She explained that they take things and that they might take your life away if you do not do what they want. Before the Respondent left El Salvador, she was a student in San Salvador at Centro Cultural. She was studying English and computers. She began her studies there in October 2004.

Her father is living here in the United States. He is in Florida and has Temporary Protected Status (TPS). The Respondent does not recall when her father left El Salvador to come to the United States. She believes it was roughly four years before she came to the U.S. The Respondent does not know why her father came to the U.S., but he supported the family financially. The Respondent's mother also worked. The Respondent's mother is now here in the U.S. The Respondent does not talk to her mother. She explained that she has problems with her mother. The Respondent does not know if her mother is currently working.

In San Salvador, the Respondent lived in the house of her friend, Reyna Isabel Rivas. That friend has now left and no longer resides there. The Respondent explained that while she was living with her she went to school by bus. She had to walk a fair distance to get to the bus stop, including along a street without many houses or people.

In October 2004, when the Respondent was coming from school, she saw a group of people she

recognized as gang members.[2] They began following her and, while the Respondent walked faster, they caught up and asked her for money. She gave them all the money she had. They then waited for her every day after school and asked for money. She explained that every day it became worse and worse and that there were many of them. She explained that they always threatened her and told her that her life would end if she did not do what they wanted her to do. She acknowledged on cross-examination that the gang members not say why they asked the Respondent for money.

She told her friend Reyna Isabel about what was happening to her. Reyna Isabel told the Respondent that that had happened to her and that they had to do what they were asked. The Respondent later stated that she believed it was a different group that had caused Reyna Isabel problems. The Respondent first testified that she did not tell anyone at her school what was happening, but when confronted with her written statement did acknowledge that she had told a teacher what was happening.

One day (according to her statement, in February 2005), a lot of the gang members followed her. They ripped off her clothes and began forcefully touching her. They took off her shirt. They began to touch her, including on her breasts. She began

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[2] This apparently happened beginning on the first day she went to school there.

screaming for help. Some people were nearby. The gang members threw her down. As the gang members were leaving, they told her that the next time they got her they would do everything they wanted. The Respondent, with no shirt, ran away to her house. The Respondent had bruises and told her friend what happened but did not report the incident to the police. She was afraid that the gang members would seek revenge and do something worse to her. The Respondent had seen news reports that the gang members had killed people because they did not do what the gangs asked them to do.

The Respondent did not leave the house until she came to the U.S. This was for approximately two months, but she was not sure exactly. The Respondent described coming to the U.S. and that she met up with her boyfriend, Augustin Rivas, and his brother in San Vicente and that they came to the U.S. together. She explained that she told her boyfriend some of the problems she had had with the gangs but did not tell him everything. She did not tell him that they had tried to rape her and did not tell him that they physically attacked her. Her boyfriend and his brother told her that they were also being bothered by gang members.

The Respondent answered some additional questions on cross-examination. She acknowledged that she also had problems with gang members when she lived in San Vicente. They were different gang members than those who bothered her in San Salvador. She explained that they would steal money from her outside of school. She was asked whether there was any particular reason that they

asked her for money, and she indicated that there was not. She also testified that they asked other people for money as well. She also acknowledged that the gangs asked her boyfriend for money and they asked him to join the gang. The Respondent did not know why. She was also asked whether the gang members knew the Respondent had family in the U.S. She testified that she does not know if they knew that. She stated that they did not mention that to her.

The next witness to testify was Augustin Rivas. His affidavit appears in the record at Group Exhibit 4/Tab E. He is a citizen of El Salvador who is now a lawful permanent resident, as a derivative of his father who had filed immigration papers while the witness was still in El Salvador. Augustin Rivas testified that he came to the U.S. with his brother, with Mayra, and with some other people. He explained that he, his brother, and Mayra came because of what happened in El Salvador, namely that they had each been threatened by gang groups asking for money and otherwise threatening them. Augustin reported being threatened when he was in high school in San Vicente and at another place he studied in San Salvador. Augustin's parents were in the U.S. when he was in school and his parents were working and supporting him. Augustin testified that he knew about Mayra having problems and that they would talk about it on the phone and that she was very afraid. He stated that he was having the same problem. That problem was the gang asking for money. Augustin said that they knew his parents were here and they threatened him for money. He

also explained that Mayra seemed very worried and they threatened to do worse things to her, like hit her. On cross-examination, he was asked whether he knew why they asked the Respondent for money. He stated that they always ask for money from people whether they have money or not. He stated that the gangs ask for money from everyone. He stated that his friends were asked for money and that he would see gang members asking people for money.

The next witness to testify was Mr. Andre Rivas, the father of Augustin Rivas. He is a lawful permanent resident of the U.S. and a citizen of El Salvador. He left El Salvador in March 1997 to work and to improve his family's situation. He supported family members who remained in El Salvador. He explained that he learned about problems his son was having through his mother, who was caring for his children in El Salvador. He heard that they were being asked for money and threatened. He identified the Respondent and indicated that she came to the U.S. with two of his sons. He understood that they had left El Salvador because they were being bothered and wanted to come to school. He also explained that he is looking after Mayra in the U.S. and that he has heard from her that they asked her for money and that they said that they would rape her.

The last witness to testify was Ms. Carmen Chapin. Her affidavit appears in the record at Group Exhibit 7 Tab B. She was not offered as and did not testify as an expert witness. She does not know the Respondent, other than having seen her at court dates. She testified with respect to her personal

knowledge about conditions in El Salvador. She explained that she has returned from the U.S. to El Salvador four times over the last four years. She is also in close contact with relatives of hers who remain in El Salvador. She explained that her own mother is afraid she could be victimized by crime in El Salvador because she receives money from the U.S. She also described an incident in which her sister-in-law was a crime victim when a bus she was riding was boarded by gang members who took passengers' jewelry and cash. The roughly 5-7 passengers who were on the bus were all robbed. Ms. Chapin explained that bus drivers sometimes allow passengers to be robbed instead of paying extortion to the gang members. She also testified that she has noticed increased violence and gang activity in El Salvador, particularly in connection with drugs.

The Department of Homeland Security argues that the particular social group claimed by the Respondent is not cognizable under the statue and that there also is an insufficient nexus in this case between the harm feared by the Respondent and a statutorily protected ground. DHS argues in part that the motivation of the gang members in this cases is to extort money and that the Respondent and others were targeted because gang members believed they had money and were simply using them as a source to extort money without caring where the money came from.

Applicable Law

A. Asylum. To establish eligibility for asylum under section 208 of the Immigration and Nationality Act, an applicant must show that he or she is unable or unwilling to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. *See* INA § 101(a)(42)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of S-M-J*, 21 I. & N. Dec. 722 (BIA 1997). Under the Real ID Act amendments, effective May 11, 2005, the applicant must demonstrate that one of the statutorily protected grounds would be "at least one central reason" for persecuting the applicant.

The applicant bears the burden of proof, and the court must make a threshold determination of credibility. *See Matter of O-D-*, 21 I. & N. Dec. 1079 (BIA 1998). An applicant's own testimony may be sufficient to meet the burden of proving an asylum claim. *See Matter of Dass*, 20 I. &. N. Dec. 120 (BIA 1989); 8 C.F.R. 1208.13(a). Under the Real ID Act amendments, effective May 11, 2005, INA §208 now explicitly provides that corroboration may be required if it can reasonably be obtained and that credibility is to be assessed under "the totality of the circumstances" considering "all relevant factors." An adverse credibility determination must be supported by specific, cogent reasons. *See Tewabe v. Gonzales*, 446 F.3d 533 (4th Cir. 2006). *See also Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006) (regarding need for corroboration).

Persecution has been interpreted to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant. *See Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005).

In this case, the Respondent claims that she fears future persecution on account of her membership in a particular social group. The Board has held that, to be cognizable under the statute, members of a "particular social group" must share a "common immutable characteristic," which may be an innate characteristic or may be a shared past experience. In either case, it must be a characteristic that members of the group either cannot change or should not be required to change. The Board has also noted that the social visibility of the members of a claimed social group is an important consideration in evaluating whether a set of individuals is a particular social group for purposes of asylum. *See Matter of A-M-E & J-G-U*, 24 I & N Dec. 69 (BIA 2007) (factors to be considered in determining whether a particular social group exist s include whether the group's shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership; also noting that the group must not be indeterminate or too vaguely defined); *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985).

B. Withholding of Removal Under 241(b)(3). To establish eligibility for withholding of removal under INA § 241(b)(3), an individual must

demonstrate a "clear probability" of persecution on account of one of the five statutorily protected grounds. *See INS v. Stevic*, 467 U.S. 407 (1984).

C. Relief from Removal Under the Convention Against Torture. To be extended protection under Article III of the Convention Against Torture, Respondent must establish that it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16, 1208.17. Under *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004), in assessing a claim under the CAT an immigration court must consider "all evidence relevant to the possibility of future torture" and cannot rely solely on an adverse credibility determination to deny relief.

Analysis and Findings

A. Credibility. The Court has considered all of the documentary evidence in the record and the testimony presented, as well as the arguments of counsel, even if not specifically mentioned here. While there were some inconsistencies in the case, the Court ultimately concludes that, under the totality of the circumstances, those were minor and the Respondent is credible. The Respondent provided a detailed account that was plausible, consistent with country condition information in the record, and materially consistent with witness testimony. She was candid and responsive, and her demeanor was appropriate. The Court finds the Respondent to be credible.

B. Persecution, Nexus to a Protected Ground, and Particular Social Group. The Court concludes that the Respondent has established that she has a well-founded fear of future persecution in that she has sufficiently demonstrated that she has a well-founded fear of being raped in the future in El Salvador by gang members. The more difficult issues in this case concern (1) whether the feared persecution would be on account of her membership in a particular social group (that being "young females who regularly receive money from a parent working in the United States and who lack protection from those in a society who traditionally provide protection to young females"), and (2) whether the particular social group she has identified ("young females who regularly receive money from a parent working in the United States and who lack protection from those in a society who traditionally provide protection to young females") is cognizable under the INA.

Factual inquiries in this area are notably difficult. Deciphering the motives of potential persecutors, such as the gang members in this case, can be exceedingly challenging. After a careful consideration of the record, the Court must conclude that, despite the Respondent's sympathetic story, this Record does not demonstrate that a central reason for the Respondent's feared persecution would be on account of her membership in the particular social group she claims. The Respondent testified that the gang members who extorted money from her and sexually assaulted her never told her why they had chose her as a target. While at this point she

seems most afraid of the gang members who attempted to rape her in San Salvador, she testified that she had previously had money taken from by gang members when she lived in San Vicente. The Respondent's boyfriend and his brother were also targeted by gang members who asked them for money. Augustin Rivas testified that gang members always ask for money from people whether they have money or not and stated that the gangs ask for money from everyone. He stated that his friends were asked for money and that he would see gang members asking people for money. Country condition information in the Record demonstrates generally the pervasive and widespread nature of gang violence and other gang criminal activity in El Salvador. From this particular record, it appears as a factual matter that the Respondent was targeted principally because she was a source of money for the gangs. There is not a sufficient showing that the reprehensible sexual assault on the Respondent was "on account of" her membership in any particular social group. (Had she not been female, she may or may not have been targeted for sexual assault or rape by them - but that does not mean that the attempted rape was because of her membership in a particular social group.) Accordingly, there has not been a sufficient showing as a factual matter on the record in this particular case that the Respondent was targeted by the gangs based on her being a "young female who regularly receives money from a parent working in the United States and who lacks protection from those in a society who traditionally provide protection to young females."

For this reason, the Court concludes that the Respondent has not established the statutory requirements for a grant of asylum or a grant of withholding of removal under INA § 241(b)(3). Her claims for those forms of relief must be denied. The Court is accordingly not going to reach the question of whether the claimed particular social group, "young female s who regularly receive money from a parent working in the United States and who lack protection from those in a society who traditionally provide protection to young females," is a particular social group that is cognizable under the INA.

C. Relief under the Convention Against Torture. While the Court remains concerned for the Respondent's safety and concerned about gang violence in general in EI Salvador, the Court cannot conclude on the basis of this record that it is more likely than not that the Respondent would be tortured by the gang members should she return to EI Salvador. Moreover, there has not been a sufficient showing that government officials would acquiesce in any feared torture, which is a required showing for relief under the CAT when tortured is feared at the hands of private individuals. *See* 8 C.F.R. § 1208.18(a)(7); *In Re S-V*, 22 I & N Dec. 1306 (BIA 2000).

Order

It is ordered that the Respondent's applications for asylum, withholding of removal under the INA, and relief from removal under the Convention Against Torture are hereby denied.

It is further ordered that the Respondent is to be removed from the United States to El Salvador.

Appeal Rights

Both parties have the right to appeal this Court's decision to the Board of Immigration Appeals. Any appeal must be filed within 30 calendar days of this decision. Under the regulations, a notice of appeal must be received by the Board by that deadline. The notice of appeal must also state the reasons for the appeal. *See* 8 C.F.R. § 1240.15.

Advisal Regarding Compliance With Court's Order

In accordance with 8 C.F.R. § 1240.13, the Respondent is hereby advised that the Respondent must depart the United States in accordance with this Court's order and that any failure to depart could lead to serious consequences, including the imposition of civil and criminal penalties under INA §§ 243 and 274D.

Date: June 25, 2007 Elizabeth A. Kessler
Immigration Judge

Supreme Court, U.S.
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OFFICE OF THE CLERK

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No. 09-1079

In the Supreme Court of the United States

MAYRA RIVAS-RODRIGUEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner had failed to demonstrate that she faces a well-founded fear of persecution for which "one central reason" is her membership in a particular social group, as required to establish her eligibility for asylum under 8 U.S.C. 1158(b)(1)(B)(i).

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In the Supreme Court of the United States

No. 09-1079

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v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 355 Fed. Appx. 740. The decisions of the Board of Immigration Appeals (Pet. App. 6a-8a) and the immigration judge (Pet. App. 9a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2009. The petition for a writ of certiorari was filed on March 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General and the Secretary of Homeland Security may grant asylum

to an alien who is a "refugee," 8 U.S.C. 1158(b)(1)(A), defined as a person "who is unable or unwilling to return to [his or her] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A). In 2005, Congress modified the requirements for establishing eligibility for asylum. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 303.[1] The applicant bears the burden of establishing that he or she is a refugee, as defined above. 8 U.S.C. 1158(b)(1)(B)(i). To come within that definition, the applicant must establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting" him or her. *Ibid.*

2. a. Petitioner, a native and citizen of El Salvador, entered the United States on April 2, 2005. Pet. App. 2a, 10a. On April 4, 2005, the Department of Homeland Security served petitioner with a Notice to Appear, alleging that she was removable pursuant to 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without having been admitted or paroled. Pet. App. 10a; see *id.* at 6a. Petitioner conceded that she was removable as charged, but (after the effective date of the REAL ID Act) sought various forms of relief, including asylum. *Id.* at 2a, 10a; see Gov't C.A. Br. 4, 19 n.3. Petitioner based her application for asylum on, *inter alia*, her claimed fear of future persecution in El Salvador by gang members on account of her membership in a particular social group. Pet. App. 11a. Petitioner described

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[1] The amendment applies to applications for asylum filed after May 11, 2005. 8 U.S.C. 1158 note.

her claimed social group as "young females who regularly receive money from a parent working in the United States, and who lack[] protection from those in a society who traditionally provide protection to young females." *Ibid.* (internal quotation marks omitted).[2]

b. The Immigration Judge (IJ) denied petitioner's application for asylum. Pet. App. 9a-24a. As relevant here, the IJ found that petitioner had established a well-founded fear that she would face persecution by gang members if she returned to El Salvador. *Id.* at 21a. The IJ identified the "more difficult issues in this case" as (1) whether the feared persecution was on account of membership in a "particular social group" and (2) whether petitioner belonged to a "particular social group" cognizable under the INA. *Ibid.*

On the question whether petitioner had shown the requisite nexus between the persecution and the putative social group (*i.e.*, that the persecution was "on account of" her membership in that group), the IJ explained that "factual inquiries in this area are notably difficult" and that "[d]eciphering the motives of potential persecutors, such as the gang members in this case, can be exceedingly challenging." Pet. App. 21a. On the record here, the IJ concluded, that factual inquiry showed that petitioner had been targeted by gangs principally because she was a source of money; petitioner's boyfriend had testified that he, his brother and friends,

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[2] Petitioner also sought withholding of removal to El Salvador, which required her to show that her "life or freedom would be threatened in that country because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The Immigration Judge and the Board of Immigration Appeals rejected that claim, Pet. App. 7a-8a, 23a, and it is not at issue here. See note 4, *infra*.

and indeed "everyone" were asked for money by gang members. *Id.* at 22a. "Accordingly," the IJ concluded, "there has not been a sufficient showing as a factual matter on the record in this particular case that [petitioner] was targeted by the gangs based on" her membership in the group she identified in her asylum application. *Ibid.* The IJ therefore denied asylum without reaching the question whether petitioner's claimed social group was cognizable under the INA. *Id.* at 23a.

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 6a-8a.

The Board found that there was not sufficient reason to reverse the IJ's denial of petitioner's application for asylum. Pet. App. 7a. First, the Board concluded that the IJ's factual findings were not clearly erroneous. *Ibid.* Second, the Board concluded that the IJ did not err in determining that petitioner had not met her burden of "establish[ing] a nexus" between her feared persecution and a protected ground, "because [petitioner] did not show that her membership in a particular social group was or will be at least one central reason for the harm she experienced or will experience upon return to El Salvador." *Ibid.* (citing 8 U.S.C. 1158(b)(1); 8 C.F.R. 1003.1(d)(3)(ii); and *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007)). The Board therefore did not reach the question whether petitioner had successfully established that she was a member of a "particular social group" under the INA. *Id.* at 7a n.2.

3. Petitioner filed a petition for review. The court of appeals denied the petition in an unpublished, per curiam decision. Pet. App. 1a-5a.

The court of appeals first summarized the applicable law and standard of review as set forth in the INA and implementing regulations, in decisions of the Board, and

in its own precedents. Pet. App. 2a-4a. As relevant here, the court stated that an asylum applicant must establish a fear of persecution based on a protected ground; that "[t]he protected ground must be a central reason for being targeted for persecution"; and that "[a] central reason is one that is more than '"incidental, tangential, superficial, or subordinate to another reason for harm."'" *Id.* at 4a (quoting *Quinteros-Mendoza* v. *Holder*, 556 F.3d 159, 164 (4th Cir. 2009), and *J-B-N-*, 24 I. & N. Dec. at 214).

Turning to the facts of this case, the court of appeals held that petitioner had not shown from the record evidence that she experienced or had a well-founded fear of persecution "because of her membership in a particular social group." Pet. App. 4a. The court concluded that substantial evidence supported the IJ's findings "that the gangs in San Salvador were indiscriminate with whom they targeted" and that "[petitioner] would be targeted regardless of her membership in her particular social group." *Id.* at 4a-5a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of another court of appeals. Contrary to petitioner's contention, the courts of appeals have not issued conflicting holdings on the validity of the Board's interpretation of the statutory term "one central reason." Even if there were such a circuit conflict, however, this case would not implicate it, because the decisions below did not hold that this case was controlled by the standard for evaluating "mixed-motive" asylum claims. Rather, they concluded that petitioner would have been "targeted *regardless of* her membership" in a putative particular

social group. Pet. App. 5a (emphasis added). Further review therefore is not warranted.

1. a. Petitioner's claim of a conflict centers on the Board's decision in *In re J-B-N-*, 24 I. & N. Dec. 208 (2007). In that case, the Board examined the extent to which the 2005 enactment of 8 U.S.C. 1158(b)(1)(B)(i) had changed the standard for evaluating asylum claims alleging persecution based on "mixed motives." 24 I. & N. Dec. at 212. The Board concluded that the standard it had previously applied "ha[d] not been radically altered" by the statutory amendment. *Id.* at 214. Based on the plain meaning of the term "central," the use of the indefinite modifier "one" (rather than the definite "the"), and the legislative history, *id.* at 212-213, the Board concluded that an alien cannot carry his or her burden of showing that the protected ground was a "central" reason if the protected ground played only a "minor role" in the alien's past or feared future mistreatment. *Id.* at 214. In other words, the Board explained, the alien must show that the protected ground was more than just "incidental, tangential, superficial, or subordinate to another reason for harm." *Ibid.*

The aliens in that case petitioned for review. The Third Circuit denied the petition, because the record supported a finding that the protected grounds were "no more than an incidental factor in their persecution." *Ndayshimiye* v. *Attorney Gen. of the U.S.*, 557 F.3d 124, 131 (2009). In reaching that conclusion, the Third Circuit approved most of the Board's articulation of the mixed-motive standard; it agreed that the Board's conclusion that a protected ground must be more than "incidental, tangential, or superficial" was consistent with both the amended statute and its legislative history. *Id.* at 130-131. The court concluded, however, that the

Board's interpretation was "in error *only* to the extent that it would require an asylum applicant to show that a protected ground * * * was not 'subordinate' to any unprotected [ground]." *Id.* at 129 (emphasis added). The court concluded that the language of the statute, which uses the phrase "*one* central reason" rather than "*the* central reason," permits an alien to establish eligibility for asylum if a protected ground is one of the central grounds for persecution, whether or not "one of those central reasons is more or less important than another." *Ibid.* The court disapproved only of the Board's use of the term "subordinate" in its standard: "once the term 'subordinate' is removed, the [Board's] interpretation constitutes a reasonable, valid construction of [the] 'one central reason' standard." *Id.* at 131. The court concluded that the Board's "misstep in interpreting [Section 1158(b)(1)(B)(i)]" did not affect the disposition of the petition for review, which it denied. *Id.* at 131, 133, 134.

Because the discussion of the term "subordinate" had no effect on the disposition of the case before the Third Circuit, that discussion was dictum. See *Ndayshimiye*, 557 F.3d at 133 (acknowledging that the Board's "opinion did not rest on a finding that [the protected ground] was subordinate to other reasons for persecution"). Since deciding *Ndayshimiye*, the Third Circuit has not relied on that dictum as precedent to grant any petition for review in any published or unpublished decision. Nor has the Board had occasion to consider in any precedential decision the significance of the Third Circuit's dictum, or to explain whether the Board meant the term "subordinate" (as used alongside "incidental, tangential, [and] superficial") to be read in a manner consistent with the Third Circuit's admonition that "the mixed-

motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate," *id.* at 129.

b. No other court of appeals has disapproved the Board's definition even in part, and no other court of appeals (including the court below) has even considered the narrow question whether the Board's standard should not have included the term "subordinate." Accordingly, there is no circuit conflict warranting this Court's review.

Petitioner asserts (Pet. 7-8, 11, 13-14) that two other courts of appeals have joined the Third Circuit in partially disapproving of the Board's standard. That contention is incorrect. Neither of the decisions petitioner cites even discussed the issue, and both decisions denied petitions for review of the BIA's asylum-eligibility decisions.

In *Parussimova* v. *Mukasey*, 555 F.3d 734 (2009), the Ninth Circuit reiterated the standard set out in the Board's decision in *J-B-N-* and stated, "We are persuaded by such interpretation." *Id.* at 741. The court did not separately parse the term "subordinate" as used by the Board; although it noted that "persecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant," it did not suggest that the Board's standard was at all inconsistent with those observations. *Ibid.* And the court agreed with the Board that the alien in that case had not presented sufficient evidence to compel the conclusion that the protected ground was a central motivating factor in her persecution. See *id.* at 741-742.

Nothing in *Parussimova* supports petitioner's claim of a circuit conflict or casts doubt on the Board's standard.[3]

The other case petitioner identifies as agreeing with the Third Circuit is *Marroquin-Ochoma* v. *Holder*, 574 F.3d 574 (8th Cir. 2009). In that decision, the Eighth Circuit merely observed that a protected ground "need not be solely, or even predominantly, on account of the imputed political opinion," and cited *Parussimova* for that proposition. *Id.* at 577. It did not discuss *J-B-N-* or the Board's mixed-motive standard at all, although the court made clear that in the case before it the IJ had conducted a proper mixed-motive inquiry and had not applied any "impermissible 'single motive' requirement." *Ibid.* And as in both *Ndayshimiye* and *Parussimova*, the court denied the petition for review because the alien had not shown that the protected ground was a central reason for her persecution. See *id.* at 577-579, 580.

c. Moreover, the courts of appeals that petitioner identifies (Pet. 8-9, 14-16) as conflicting with the decisions discussed above—including the court below—have not in fact addressed the issue discussed in *Ndayshimiye*. Rather, in the decisions that petitioner cites, the courts simply stated that the protected ground must be "one central reason" for the claimed mistreatment and then recited and applied, as a whole, the Board's interpretation that the protected ground not be "incidental, tangential, superficial, or subordinate" to an unprotected ground. See *Shaikh* v. *Holder*, 588 F.3d 861, 864

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[3] As petitioner notes (Pet. 13), the Third Circuit opined in *Ndayshimiye* that the Ninth Circuit's decision in *Parussimova* "implicitly supports the excision of the word 'subordinate' " from the Board's standard. *Ndayshimiye*, 557 F.3d at 130. Even if that were so, it indisputably had no effect on the disposition of *Parussimova*.

(5th Cir. 2009); *Quinteros-Mendoza* v. *Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Singh* v. *Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008). None of them separately analyzed the term "subordinate"—the only term that the Third Circuit found problematic—and none of them denied review on the ground that the claimed ground was not "central" simply because it was "subordinate" to another reason. See, *e.g.*, *Quinteros-Mendoza*, 556 F.3d at 165 (holding that the alien "ha[d] provided no evidence that his religious or political beliefs were more than incidental or tangential to any part of the persecution he suffered").

Thus, at most, a single court of appeals has voiced disagreement, in dictum, with a single word in the Board's formulation of the standard it applies in mixed-motive cases. No other court of appeals has addressed the Board's reference to "subordinate" reasons, much less held that the Board's approach to mixed-motive cases is erroneous in some broader sense that could benefit petitioner.

2. Even if there were a ripe conflict between the Third Circuit's decision in *Ndayshimiye* and the decisions of other courts of appeals, this case would not implicate that conflict. As the court of appeals correctly recognized, petitioner's evidence did not establish that her membership in a putative social group was *a* central factor in her persecution. The only suggestion in the decision below that mixed-motive analysis was relevant to this case at all is the citation of the court of appeals' prior decision in *Quinteros-Mendoza*, which in turn quoted the standard the Board set out in *J-B-N-*. See Pet. App. 4a. But neither the court below, nor the Board, nor the IJ suggested that petitioner's claim for asylum failed because her claimed protected ground was "subordinate" to an unprotected ground, in a way incon-

sistent with the Third Circuit's dictum in *Ndayshimiye*. To the contrary, the court of appeals concluded that "substantial evidence support[ed] the [IJ's] finding[s]," *i.e.*, that the gangs who targeted petitioner "were indiscriminate" and that petitioner "would be targeted *regardless* of her membership in her particular social group." *Id.* at 4a-5a (emphasis added); accord *id.* at 7a (Board's decision); *id.* at 21a-23a (IJ's finding that the record "does not demonstrate that *a* central reason for [petitioner's] feared persecution would be * * * her membership in the particular social group she claims") (emphasis added).

Thus, given the record evidence, the court of appeals correctly sustained the IJ's determination that, even if petitioner were a member of a particular social group, any such membership was at most an "incidental" or "tangential" reason for the gang members' actions. Every one of the decisions petitioner cites recognizes that such an "incidental" reason is not a "central reason" under Section 1158(b)(1)(B)(i). See, *e.g.*, *Ndayshimiye*, 557 F.3d at 130-131, 133. Further review therefore is not warranted.[4]

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[4] Although the question presented discusses only petitioner's eligibility for asylum, see Pet. i, the petition for a writ of certiorari contains a few tangential references (see Pet. 3, 9, 17) to withholding of removal, a distinct form of relief that is not properly at issue here. The statute discussed in the question presented, Section 1158(b)(1)(B)(i), applies directly only to eligibility for asylum; withholding of removal is governed by 8 U.S.C. 1231(b)(3). The Board has not yet explained in any precedential decision how the 2005 adoption of Section 1158(b)(1)(B)(i) may affect the standard for withholding of removal, and this case would present no occasion to take up that question: petitioner has never disputed the Board's conclusion that "because [petitioner] has not met the burden of proof for asylum, it follows that she cannot meet the more stringent burden of proof for withholding of removal," Pet.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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App. 7a-8a. See generally, *e.g.*, *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010) (matters not fairly included in the question presented are not properly before the Court, even if referred to in the text of the petition for a writ of certiorari).

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In the Supreme Court of the United States

MAYRA RIVAS-RODRIGUEZ,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent's opposition concedes precisely that which it seeks to deny. Respondent states:

> As relevant here, the court stated that an asylum applicant must establish a fear of persecution based on a protected ground; that "[t]he protected ground must be a central reason for being targeted for persecution"; and that "[a] central reason is one that is more than "'incidental, tangential, superficial, or *subordinate* to another reason for harm.'"" (Emphasis added).

Opp. 5. This definition of "one central reason" applied by the United States Court of Appeals for the Fourth Circuit Court is irreconcilable with the plain language of the statute and is squarely at odds with the definitions adopted by the Courts of Appeals for the Third, Eighth, and Ninth Circuits, despite respondent's arguments to the contrary.

In this case, the Immigration Judge (IJ) specifically found that Ms. Rivas-Rodriguez was targeted as a source of money by gang members and that she "has a well-founded fear of future persecution in that she has sufficiently demonstrated that she has a well-founded fear of being raped in the

future in el Salvador by gang members." Pet. App. 21a-22a. Ignoring for the moment that gang members are unlikely to target the general population for sexual exploitation to obtain money, the Fourth Circuit improperly subordinated her social group membership, holding that she "would be targeted regardless of her membership in her particular social group." Pet. App. 5a. Respondent provides no logical explanation as to how this is not an improper subordination to an overarching unprotected ground. Under this reasoning, where both a protected ground and an unprotected ground are "central reasons" for persecution, a court can always subordinate the protected ground and deny asylum. This is precisely what Congress intended to avoid in the enactment of the REAL ID Act of 2005, to resolve "conflicts between fora" and provide a unified standard for analyzing persecution based on mixed-motives. Pet. 4. Under the Board of Immigration Appeals' (BIA) J-B-N- decision and as adopted by the First, Fourth, and Fifth Circuits, Congress's intent is denied.

Moreover, although respondent's arguments that "no split exists" are imaginative, they mischaracterize what is occurring between the circuits on the proper interpretation of "one central reason." Respondent acknowledges that the Third Circuit in *Ndayshimiye* rejected the BIA's interpretation of INA §208 (Opp. 6-7), but seeks to diminish the Third Circuit's square rejection of the BIA's inclusion of "subordinate" in its interpretation because the term "subordinate" had no bearing on the disposition of the matter at issue and therefore

was dictum. Opp. 7. This is incorrect. The issue at hand was whether the BIA's interpretation was correct, and if not, what the correct interpretation was. The Third Circuit, conducting a careful and thorough *Chevron* analysis, concluded that the BIA's interpretation was incorrect, particularly focusing on the inclusion of "subordinate" as being inconsistent with Congress's intent. Pet. 11-13.

Additionally, respondents attempt to deny that other circuits have reached a similar conclusion as the Third Circuit, when it was the Third Circuit itself in *Ndayshimiye* that pointed to the Ninth Circuit's implicit excision of the word "subordinate" from the BIA's interpretation in *Parussimova*. Pet. 13. The respondent focuses, instead, on the Ninth Circuit's lack of an explicit discussion of the word "subordinate" in the BIA's definition (Opp. 8) and the disposition of the case (Opp. 8-9), both of which are irrelevant to the inquiry. The fact is that both the Ninth and Eighth Circuits, looking at the BIA's definition, have determined that when persecutors have mixed motives, it is irrelevant whether one of the central reasons is more important than the other. Pet. 13-14. Although implicit, both directly address the subordination issue in the BIA's interpretation and squarely reject such a characterization. *Id.* Because the Fourth Circuit Court of Appeals applied a standard that is not consistent with INA § 208(b)(1)(B)(i), and because other Circuit Courts of Appeal have explicitly or implicitly rejected this standard, this case merits this Court's review.

ARGUMENT

A. RESPONDENT'S ARGUMENTS THAT A CIRCUIT SPLIT DOES NOT EXIST ARE INCORRECT

Respondent makes an imaginative, but flawed, attempt to erase (1) an improper interpretation by the BIA of INA §208 and (2) a disagreement between the circuits as to the proper interpretation of INA §208 as intended by Congress when it enacted the REAL ID Act of 2005. In defining the "at least one central reason" standard, the Courts of Appeals have adopted definitions that are fundamentally inconsistent with each other. While the First, Fourth, and Fifth Circuits apply the BIA's definition that requires the protected ground be "more than incidental, tangential, superficial, or subordinate" to another reason, the Third, Eighth, and Ninth Circuits have held that the protected ground need not be dominate to any other reason. *See e.g. Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) (citing *In re J-BN-*, 24 I. & N. Dec. 208 (BIA 2007)); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009); *Ndayshimiye v. Attorney General*, 557 F.3d 124, 129-30 (3d Cir. 2009); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir 2009); *Parussimova v. Mukasey*, 533 F.3d 1128, 1135 (9th Cir. 2008), amended by 555 F.3d 734 (9th Cir. 2009).

Respondent concedes that the Third Circuit in *Ndayshimiye* rejected the BIA's interpretation of INA §208, but seeks to diminish the Third Circuit's square rejection of the BIA's inclusion of

"subordinate" in its interpretation because the term "subordinate" had no bearing on the disposition of the matter at issue and therefore was dictum. Opp. 6-8. This is incorrect. The issue at hand was whether the BIA's interpretation was correct, and if not, what was the correct interpretation. The Third Circuit, conducting a careful and thorough *Chevron* analysis, concluded that the BIA's interpretation was incorrect, particularly focusing on the inclusion of "subordinate" as being inconsistent with Congress's intent. Pet. 11-13.

Respondent's reasoning to deny that other circuits have reached a similar conclusion as the Third Circuit is flawed as well. It was the Third Circuit itself in *Ndayshimiye* that pointed to the Ninth Circuit's implicit excision of the word "subordinate" from the BIA's interpretation in *Parussimova*. Pet. 13. The respondent focuses, instead, on the Ninth Circuit's lack of an explicit discussion of the word "subordinate" in the BIA's definition and the grounds for disposing of that particular case, both of which are irrelevant to the inquiry here which is whether the circuits disagree on the proper definition of INA §208. The fact is that both the Ninth and Eighth Circuits, looking at the BIA's definition, have determined that when persecutors have mixed motives, it is irrelevant whether one of the central reasons is more important than the other. Although implicit, both directly address the subordination issue in the BIA's interpretation and squarely reject such a characterization. These opposing definitions cannot be reconciled. In *Parussimova* , the Ninth Circuit

held that the under the revised statute, the protected reason need not be the most important or dominant reason for the persecution. 555 F.3d at 740-41. But, as the Third Circuit explained, the "subordinate" requirement in the BIA's definition imposes a "mirror image of the rejected dominance test." *Ndayshimiye*, 557 F.3d at 129-30. As the Third Circuit's reasoning makes clear, a definition that requires that the protected ground not be subordinate to any other reason is at odds with a definition that holds the protected reason need not be dominant to all other reasons. *See id.* Thus, any court that requires an asylum applicant to demonstrate that the protected ground is not subordinate to any other grounds requires a higher standard of proof than a court that does not require the asylum applicant to demonstrate that the protected reason is dominant to any other reason. Such disparate definitions cannot be squared with each other and could result in inconsistent rulings between the circuits.

B. CONTRARY TO RESPONDENT'S ARGUMENTS, THE FOURTH CIRCUIT SUBORDINATED PEITIONER'S GROUP TO ANOTHER UNPROTECTED GROUND

Respondent argues that Ms. Rivas-Rodriquez, as found by the Fourth Circuit, would have been targeted by gang members regardless of her membership in a particular social group, and that therefore this means that the Fourth Circuit did not follow an improper interpretation of INA §208. Opp.

10-11. This logic is flawed. This is not a case where no well-founded fear of persecution was found. The IJ specifically found that Ms. Rivas Rodriguez was targeted for her money by El Salvadoran gang members and that she had a well-founded fear of future persecution based on a well-founded fear of being raped by those gang members if returned to El Salvador. Pet. App. 21a-22a. Yet, the Fourth Circuit, specifically following the BIA's interpretation in J-B-N-, a definition rejected expressly and implicitly by the Third, Eighth, and Ninth Circuits, subordinated the motives behind her sexual exploitation, finding that she would have been targeted regardless of her membership in a particular social group. Pet. App. 4a-5a. This is precisely what Congress intended to avoid by enacting the REAL ID Act of 2005. Congress intended to resolve the "conflict between the fora" and to provide uniformity in the interpretation of "one central reason." Pet. 3-4. This has not been achieved.

Under the Fourth Circuit's reasoning, unless an appellant would not have been persecuted ***but for*** the protected ground, the appellant may never qualify for asylum under INA § 208(b)(1)(B)(i). But that is simply not the requirement of the statute and such a ruling evades the mixed motive analysis. INA § 208(b)(1)(B)(i) only requires that the protected ground be "at least one central reason" for the persecution, and the evidence demonstrates that Ms. Rivas-Rodriguez' membership in a protected social class was at least one central reason for her persecution, regardless of any other reasons.

CONCLUSION

For the reasons stated above and in the petition, the Petition for a Writ of Certiorari should be granted.

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